Supreme Court, U.S.
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No. 01-1163

In The

Supreme Court of the United States

LORRAINE MOSER, Administratrix of the Estate of Jennifer L. Moser, deceased,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review a decision of the United States Court of Appeals for the Fourth Circuit holding that Petitioner's state-law tort claim, which alleged that the passive-restraint system in 1990 Ford Escorts was unreasonably dangerous without the use of a manual lap belt and that Ford should have given consumers warnings to that effect, is preempted by the National Traffic and Motor Vehicle Safety Act because the claim conflicts with Federal Motor Vehicle Safety Standard 208 for the same reasons articulated by this Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

LISTING OF PARENT CORPORATIONS AND SUBSIDARIES PURSUANT TO RULE 29.6

Ford Motor Company has no parent corporation and no other corporation has a financial interest in this matter. The following is a list of publicly traded domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

United States- Ceradyne, Inc.
Collision Team of America, Inc.
Ecostar Electric Drive Systems, L.L.C.
Edelson Technology Partners III
FRN of San Diego, LLC
FRN of Tulsa, LLC
J.D. Power Clubs, Inc.
Metropolitan Realty L.L.C.
Vastera, Inc.

Argentina - Ford Credit Compañía Financiera S. A.

Canada- Ballard Power Systems

Denmark- Ford Motor Company A/S

Finland- Oyj Ford Abp

Germany- Ford Werke-Aktiengesellschaft

Japan- Mazda Motors Corporation

Korea- Ford Motor Company of Korea

Norway- Ford Motor Norge A/S

Vietnam- Ford Vietnam Limited

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STATEMENT OF THE CASE

Petitioner's warning claim is based on the theory that the passive-restraint system[1] in 1990 Ford Escorts is inherently defective when used without the manual lap belt provided by Ford Motor Company ("Ford") as part of the vehicle's original equipment. The Fourth Circuit held this claim preempted because, as had the claim in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), this claim sought to impose state-law tort liability for a manufacturer's selection of one of the passive-restraint options expressly authorized by Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("FMVSS 208") to promote federal motor vehicle safety purposes and objectives by gaining field experience with a variety of passive-restraint systems.

A. The Proceedings Below

Before this Court's decision in *Geier*, Petitioner described her claim as a contention that the passive-restraint system Ford chose for this vehicle was, as a whole, inherently defective. *Fourth Circuit Court of Appeals Appendix*, at p.167. Ford filed a motion to dismiss, arguing that Petitioner's claim was preempted by FMVSS 208. At a hearing on January 28, 2000, the district court noted that the issue then pending before this Court in *Geier* presented a virtually identical issue. Petitioner agreed, stating that *Geier* "presents to the United States Supreme Court the exact issue

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[1] "Passive" restraint systems are systems that meet various FMVSS 208 crash protection requirements "by means that require no action by vehicle occupants." 49 C.F.R. § 571.208, S4.1.2.1 (a). This Court has described them as "devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-35 (1983).

that this Court is faced with[,] which is whether the 'choice' of a seat belt system is defective." *Fourth Circuit Court of Appeals Appendix,* at 182. Consequently, and at the urging of Petitioner's counsel, the district court stayed its proceedings until *Geier* was decided. *See Transcript of January 28, 2000 Hearing*, at pp. 5, 16-17.

After this Court decided *Geier*, Ford renewed its motion to dismiss, and Petitioner responded. *Fourth Circuit Court of Appeals Appendix,* at pp. 276-297, 298. Petitioner urged the district court to "be wary of *Geier*" and tried to reformulate her claims. *Petitioner's Appendix*, at p. 18a. On February 2, 2001, recognizing Petitioner's effort as an attempt to circumvent the holding in *Geier,* the district court held all of Petitioner's design-defect and negligent-warning claims preempted by FMVSS 208 and granted Ford's motion to dismiss. *Petitioner's Appendix*, at p. 12a. The United States Court of Appeals for the Fourth Circuit affirmed in an unpublished *per curiam* opinion. *Petitioner's Appendix*, at pp. 1a-12a.

B. Applicable Regulatory History

As in *Geier*, the federal interest relevant here is the regulatory policy embodied in FMVSS 208. As this Court noted in *Geier*, the Department of Transportation ("DOT"), by adopting the applicable version of FMVSS 208, "deliberately provided the manufacturer with a range of choices among different passive restraint devices. Those choices would bring about a mix of different devices introduced gradually over time; and FMVSS 208 would thereby lower costs, overcome technical safety problems, encourage technical development, and win widespread consumer acceptance -- all of which would promote FMVSS 208's safety objectives." 529 U.S. at 875. The Court emphasized the importance placed by the DOT on encouraging manufacturers to provide consumers with a variety of passive-restraint systems: "Most importantly, that

standard deliberately sought variety -- a mix of several different passive restraint systems. It did so by setting a performance requirement for passive restraint devices and allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraints." 529 U.S. at 878.

The version of FMVSS 208 in effect when the 1990 Ford Escort was manufactured permitted automakers to choose from among several basic design options for occupant restraint systems:

1. Under S4.1.2.1, a passive restraint system (for example, automatic seat belts or airbags) meeting certain performance requirements in a completely passive manner;
2. Under S4.1.2.2, passive protection for frontal crashes (for example, automatic seat belts or airbags), plus manual lap belts and a seat belt warning system; or
3. Under S4.1.2.3, manual lap-and-shoulder belts with a seat belt warning system.

These design options were known as "Option One," "Option Two," and "Option Three," respectively.

Ford certified the 1990 Escort's restraint system under Option One. *See Petitioner's Appendix B*, at p. 14a. Ford met these requirements by installing (i) an automatic shoulder belt anchored on the inboard side to the vehicle's structure and attached on the outboard side to a motorized carrier that caused the shoulder belt to move into place on the occupant's body when the door was closed and the ignition turned on, (ii) a modified seat design, and (iii) a device, known as a "knee bolster," designed to absorb some of the kinetic energy and restrain movement of the

occupant's lower body in a crash. *See Fourth Circuit Court of Appeals Appendix,* at p. 343.

The motorized shoulder belt provided by Ford met the requirements of S4.1.2.1 of FMVSS 208. S4.5.3 of FMVSS 208 expressly provided that "a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an 'automatic belt') may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." It is undisputed that the motorized shoulder belt in the 1990 Escort was an "automatic belt," and it therefore was explicitly allowed to be used in place of the seat belt assembly otherwise required by the option specified in S4.1.2.1(c)(2). Indeed, because S4.5.3 authorized the installation of an automatic shoulder belt without any lap belt at all,[2] the manual lap belt provided by Ford was a voluntarily provided supplemental safety device. In short, it is undisputed that the Escort satisfied the Option One requirements of FMVSS 208 regardless of whether a manual

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[2] The DOT determined in 1974 that Volkswagen's passive restraint system, which consisted of an automatic, non-motorized shoulder belt and a knee bolster with no lap belt of any kind, met the requirements of FMVSS 208 Option 2, stating, "Option two exists . . . to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834 (1974). *See also O'Bryan v. Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's automatic shoulder-belt system met requirements of FMVSS 208 Option 2). Subsequently, and before the 1990 Escort was manufactured with both an automatic shoulder-belt system and a supplemental manual lap belt, the DOT three more times approved, and lauded, the automatic shoulder-belt system. *See* 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).

lap belt was installed and regardless of whether any lap belt that was installed was actually used by the occupant. *See Fourth Circuit Court of Appeals Appendix*, at p. 343, *See also Fourth Circuit Court of Appeals Appendix*, at p. 349.

REASONS FOR DENYING THE PETITION

There is nothing presented in the petition that warrants this Court's attention. The petition seeks review of an issue that varies only slightly, and in a narrow, fact-bound manner, from the issue squarely answered by this Court in *Geier* -- namely, whether FMVSS 208 preempts state-law claims based on a contention that automatic seat belt systems expressly authorized and encouraged by that regulation before it was amended to require airbags beginning September 1, 1996, are inherently defective. The lower courts are having no trouble understanding or applying *Geier*. There is no split in the circuits and no conflict between the circuits and any state court of last resort. The Fourth Circuit correctly held that Petitioner's tort claims were preempted pursuant to the principles articulated in *Geier*. Those claims would have stood as an obstacle to the accomplishment of the variety of passive-restraint options that, as stated in *Geier*, the DOT "deliberately sought." 529 U.S. at 864. Petitioner's state-law claim is based on the theory that consumers should have been warned that one of the options expressly approved and encouraged by the DOT to implement federal motor vehicle safety policies is inherently dangerous and defective.

Petitioner's claim was conceptually identical to the one held preempted in *Geier*. There, the plaintiff asserted that, although specifically permitted and encouraged as an option by FMVSS 208, a restraint system without an airbag could nonetheless be found inherently defective under state tort law because it did not have an airbag that the regulation said could be omitted. Here, Petitioner asserted that a passive-restraint system that did not have an integrated lap

belt could, although specifically permitted and encouraged as an option by the federal regulation, nonetheless be found defective under state tort law because there was inadequate warning to direct the use of the voluntarily provided manual lap belt that the regulation said could be omitted. There is no meaningful difference between these two claims, and the Fourth Circuit correctly held that the latter is preempted for the same reasons this Court held the former preempted in *Geier*.

A. There Is No Conflict In The Lower Courts Over The Question Whether FMVSS 208 Preempts State Law Claims That Passive-Restraint Systems Used Without Lap Belts Are Inherently Defective and Unreasonably Dangerous.

In *Geier* this Court held that a state-law tort claim that stands "as an obstacle to the accomplishment and execution of the important means-related federal objectives" of FMVSS 208 is preempted by that standard. *Geier,* at 864-865. The Fourth Circuit's decision dismissing this case is squarely in accord with every other jurisdiction to have addressed the subject since *Geier*. A survey of reported cases shows that, in the two years since *Geier*, all jurisdictions have applied conflict preemption uniformly when dealing with FMVSS 208. As one state court has put it, "the post-*Geier* cases that specifically involve FMVSS 208 have all held, based on *Geier*, that the federal standard implicitly preempted the plaintiff's claims." *Hernandez-Gomez v. Volkswagen of America, Inc.*, 32 P.3d 424, 429 (Ariz. App. 2001)(vacating judgment entered against a manufacturer based upon its use of a passive-restraint system consisting of an automatic shoulder belt and knee bolster, with no lap belt); *See also James v. Mazda Corp.*, 222 F.3d 1323 (11th Cir. 2000) (affirming summary judgment dismissing state-law claims that a passive restraint system consisting of automatic shoulder belt and manual lap

belt was defectively designed and that the manufacturer had negligently failed to warn that the vehicle was unreasonably dangerous unless the manual lap belt was worn); *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377 (7th Cir. 2000) (holding that a state-law tort claim contending that a passenger bus was defective for failing to provide drivers with a three-point restraint system was preempted by FMVSS 208).

Petitioner has cited four cases in an effort to show a conflict among the Circuits, but none of them conflict with *Geier*; none of them conflict with each other; and none of them conflict with the decision below. In fact, none of them even considered the issue presented here -- whether a manufacturer has a duty to provide a warning declaring, in essence, that one of the restraint systems promoted by FMVSS 208 is inherently defective.

Petitioner's reliance on *Fisher v. Ford Motor Co.*, 224 F.3d 570 (6th Cir. 2000) is misplaced. That decision affirmed the trial court's ruling that a federal regulation specifying language for a required airbag warning on the sun visor (i) preempted claims that the manufacturer should have used different or additional language for such a warning and (ii) did not preempt claims asserting that the specified language should have been repeated elsewhere in the vehicle. The Sixth Circuit noted that the DOT had carefully chosen the prescribed language in light of a concern that more extensive or different wording might result in "information overload" or dilute or obscure the most important information. 224 F.3d at 574. Consistent with *Geier*, the Sixth Circuit thus held that allowing a tort claim to assert the need for additional or different language would interfere with the regulation's objective. 224 F.3d at 573-74.

Petitioner does no better in citing *King v. Ford Motor Co.*, 209 F.3d 886 (6th Cir. 2000). To begin with, that decision was announced before *Geier*. Accordingly, no matter what it said or held, it could not demonstrate, as

Petitioner contends, that "courts have been unable to apply conflict preemption in a uniform manner" since this Court's decision in *Geier*. *Petition,* at p. 8. Furthermore, the only discussion of preemption in *King* addressed the plaintiff's design defect claims, which the court held were not preempted. 209 F.3d at 891-93. Those claims did not contend that passive-restraint systems with automatic shoulder belts are inherently dangerous when used without lap belts, but instead asserted that the system had been defectively implemented in that, for example, the belt anchor and knee bolster were allegedly placed in the wrong locations. Nothing about that decision reflects confusion, inconsistency, or conflict.

Petitioner's reference to *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398 (8th Cir. 2000) is equally unavailing. *Harris* did not involve restraint systems at all, and it certainly did not implicate FMVSS 208 or the policy concerns underlying that standard. It did not even involve a passenger car. Instead, the plaintiff in that case claimed that a tractor-trailer was defective because it did not have reflective tape making it sufficiently conspicuous at night. The manufacturer argued that the plaintiff's claims were preempted because the trailer complied with the federal safety standard governing lights and reflective devices, FMVSS 108.

The Eighth Circuit disagreed, noting that FMVSS 108, by its express language, simply required "at least" the specified number of signaling devices. The court found that nothing about the federal safety program would be impaired by tort claims requiring more signaling devices, and that it was common in the industry for manufacturers to add more lights, reflectors, and reflective tape than was required. 234 F.3d at 401-03. The court correctly noted that, in contrast, the safety program at issue in *Geier* was "not merely a minimum airbag safety standard," but a studied effort to gradually phase-in passive restraints. 234 F.3d at 400.

Nothing in the court's analysis conflicts with *Geier* or with the decision by the Fourth Circuit in this case.

The fourth citation used by Petitioner as purported evidence of a conflict among the lower courts, *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000), is equally unavailing for that purpose. That case did not involve the National Traffic and Motor Vehicle Safety Act, the DOT, FMVSS 208, or any other federal motor vehicle safety standard. Rather, it concerned the requirements for glass shower doors under requirements set by the Consumer Product Safety Commission ("CPSC") pursuant to the Consumer Product Safety Act, 15 U.S.C. § § 2051-2084. The Ninth Circuit held that a CPSC requirement to put identifying labels on glass shower doors (indicating such things as the manufacturer and date of production) did not preempt the plaintiff's common-law tort claim that the defendant should have warned of the hazards of the product. No CPSC regulation addressed product warnings. Accordingly, the court held that, unlike in *Geier*, the plaintiff's tort claim would not conflict with any purpose or objective of the federal regulatory program. 234 F.3d at 1070-71. Neither the holding nor the reasoning has any application to the issue presented by the petition in this case.

There is no conflict in the lower courts to warrant this Court's attention. *Geier* clearly articulated preemptive boundaries limiting state-law tort claims that seek to impose liability on a manufacturer for providing consumers with a passive-restraint system not only permitted by FMVSS 208, but affirmatively encouraged by the DOT in that standard in order to promote important federal objectives and policies. *Geier*, 529 U.S. at 886. There is no need for the Court to address that issue again.

B. There Was No Error Below.

Both lower courts followed *Geier* correctly. Petitioner is wrong in intimating that her case fundamentally differs from *Geier* simply because she is now asserting only a claim for inadequate warning. If Petitioner were right, the plaintiff in *Geier* could have side-stepped preemption very simply. All she would have had to do was abandon the claim that her Honda Accord was unreasonably dangerous because it did not have an airbag, and instead claim that she should have been warned that her Honda Accord was unreasonably dangerous to operate without an airbag. There is no discernible difference between the effect that these claims would have had in standing "as an obstacle to the accomplishment and execution of the important means-related federal objectives" of FMVSS 208 as identified by this Court in *Geier*. 529 U.S. at 864-865.

As this Court held in *Geier*, the federal program encouraging manufacturers to provide consumers with a variety of passive-restraint designs would be improperly obstructed if tort claims under state law could impose liability on manufacturers for choosing one of the options expressly provided for in the regulation. That program would be just as obstructed if tort claims under state law could impose liability on manufacturers who did not warn consumers that the federally encouraged option they chose was inherently dangerous, because any such warning plainly would deter consumers from purchasing vehicles with that option and just as plainly would thereby reduce the "mix of several different passive restraint systems" that the DOT sought to foster. 529 U.S. at 864. Nevertheless, that is what Petitioner claims she should be allowed to do. Because her claim of an alleged failure to warn is just another way of asserting that one of the options the DOT sought to encourage is inherently dangerous, her claim is preempted. As the Fourth Circuit correctly saw, Petitioner's argument is at bottom a contention that Ford should have chosen another

restraint system. *Petitioner's Appendix*, at pp. 7a-8a. This Court has already decided that issue in *Geier*.

1. Petitioner cannot, under the guise of a warning claim, base state-law liability on Ford's selection of a design option endorsed by FMVSS 208.

Petitioner's claim is based on her contention that Ford had a duty to warn occupants that the 1990 Escort was unreasonably dangerous without the use of a manual lap belt. Petitioner's claim fails because Ford chose a design option, encouraged by FMVSS 208 to promote clearly articulated federal objectives and policies, that did not include a manual lap belt. As the Fourth Circuit soundly reasoned, because Petitioner could not sue Ford for omitting the lap belt, she likewise cannot sue Ford for not adequately warning her to use it:

> Needless to say, Ford could only have such a duty if it were *true* that the car was unsafe unless the lap belt was used. Moser's inadequate warning theory is, at bottom, based on a claim that the Escort's two-point passive system was unsafe without the use of the lap belt. As we have explained above, that claim is preempted . . . Because we are precluded in this case from finding any duty on Ford's part to provide the manual lap belt, Ford can have no corresponding duty to warn occupants to use the lap belt.

Petitioner's Appendix, at p. 9a (emphasis in original.)

Undeterred, Petitioner insists that her warning claim does not conflict with FMVSS 208 because that standard "neither required nor prohibited the use of a written warning label." *Petition*, at p. 11. That is hardly the point. The point is that the DOT intended the standard to provide consumers with "a range of choices among different passive restraint devices." *Geier*, 529 U.S. at 875. Some of those choices included a manual lap belt; others did not. The one Ford selected did not, and Ford nonetheless voluntarily chose to add a lap belt as an additional safety feature.

Petitioner cannot seek to impose liability on Ford by claiming that the option it chose was inherently dangerous because it did not include an integrated lap belt. Any such claim would be preempted because it "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Geier*. 529 U.S. at 881. For the same reason, Petitioner cannot seek to impose liability on Ford for not warning that the option it chose was inherently dangerous without use of the manual lap belt. That, too, would present an obstacle to the variety and mix of devices the regulation sought. It makes no difference whether Petitioner makes a direct assault on Ford's choice of the Escort's passive-restraint system by asserting that the restraint system is inherently defective without an integrated lap belt, or attacks it indirectly by asserting that Ford must warn that the system is inherently defective without the lap belt. Either claim would stand as an obstacle to the same federal goals.

In *Geier*, this Court recognized that the DOT had specific goals in mind when it established different options for complying with FMVSS 208. *Geier*, 529 U.S. at 875-881. Chief among these was variety. The Department believed that providing alternatives would help the industry develop data on comparative effectiveness, allow the industry time to overcome safety and other technical problems associated with air bags, and facilitate the development of safer and less expensive passive restraint

systems. *Id.* at 878. Furthermore, the Department wanted to gradually develop a mix of passive-restraint devices to build public confidence and acceptance. *Id.* at 879.

As this Court held, state-law tort claims that attempt to eliminate one of these valid design options are impermissible obstacles to the federal objectives that this regulatory arrangement seeks to promote. *Id.* at 881. Parties cannot avoid the preemptive effect of FMVSS 208 merely by couching their attacks on one of these options as a "warning" claim.

2. Petitioner cannot impose de facto safety standards that nullify the DOT's design objectives.

Finally, Petitioner suggests that it should be the standard of a "reasonably prudent manufacturer," as determined and applied by a jury applying state law, that should dictate automobile safety standards, rather than the DOT's carefully reasoned judgment as expressed in FMVSS 208. *Petition,* at p. 10. But that is precisely the type of conflict this Court sought to prevent in *Geier*. *See Geier*, 529 U.S. at 881-882. Petitioner seeks a system of *de facto* safety standards that would essentially eliminate the automatic belt passive-restraint design specifically encouraged by FMVSS 208. It is illuminating that her sole liability expert, William H. Muzzy, went so far as to opine that every vehicle manufactured between 1987 and 1990 was defective unless it contained an airbag. *Fourth Circuit Court of Appeals Appendix,* at p. 288, (citing *Deposition of William H. Muzzy,* at pp. 169-170).

Petitioner's approach would be in direct conflict with the federal regulatory goals and would deny manufacturers the flexibility that the DOT intended. In *Geier*, this Court devoted considerable effort to detailing the goals, policy, and history behind FMVSS 208. *Geier,* 529 U.S. at 875-881. Petitioner now asks to revisit that subject so she can urge the

Court to disregard those goals, that policy, and that history to permit her to pursue claims that would do what the claims in that case were not allowed to do. This is no compelling reason to grant a discretionary appeal.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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